U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: October 14, 1999

CASE NO.: 1996-INA-0290

In the Matter of:

GULL WING
Employer

On Behalf Of:

IVO M. BISCHOL
Alien

Appearance: William B. Bennett, Esq.
For the Employer/Alien

Certifying Officer: Paul R. Nelson, Region IX

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 8, 1993, Gull Wing ("Employer") filed an application for labor certification to enable Ivo Marcus Bischof ("Alien") to fill the position of Custom Wood Joiner (AF 24). The job duties for the position are:

> Utilize various handtools and machines to create custom wood parts for vintage automobiles, including side panels, burl dashboards, and wood molds for fiberglass auto parts. Utilize a variety of joinery techniques to create wood parts in order to recreate aesthetics of the vintage automobiles. Read blueprints layouts and drawings,. Requisition materials needed and quality of wood to complete the project. Inspect final product for craftmanship and install.

The requirements for the position are a two years experience in the job offered. Other Special Requirements are "require verifiable references. Require apprenticeship as a cabinet maker/joiner."

The CO issued a Notice of Findings on December 23, 1994 (AF 18), proposing to deny certification on the grounds that the Employer failed to recruit adequately in its choice to advertise in the Daily Breeze instead of the Los Angeles Times as instructed by the EDD. The CO cited violations of 20 C.F.R. §§ 656.21(b)(1) and 656.21(g) requiring the advertising to be in the publication most likely to generate a response from U.S. workers. The CO also found the Alien was unqualified for the position because he lacks experience in creating wood parts for automobiles in violation of § 656.21(b)(6). The CO further found the Employer unlawfully rejected U.S. workers Bailey and Gillespie, and failed to contact U.S. worker Castillo until seven weeks after it received his resume in violation of §§ 656.21(b)(6) and 656.20(c)(8). The Employer was given notice that it must remedy the deficiencies or rebut the findings by January 27, 1995.

In its rebuttal, dated March 2, 1995 (AF 6), the Employer, through Counsel, contended that the "Daily Breeze" is a newspaper widely circulated in the area of employment and most likely to bring responses from U.S. applicants, and its circulation is wider than the L.A. Times on weekdays. The Employer submitted a map of the Daily Breeze circulation area on weekdays. The Employer also submitted a letter indicating it wanted changes in the ETA 750. The Employer further stated it rejected all U.S. applicants for job-related reasons, as applicants

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Bailey and Gillespie were rejected for lack of experience. The Employer also stated that it attempted to contact all U.S. applicants in a timely manner, but some applicants only responded to a registered letter and not to phone calls, and stated that the Alien had experience because he had performed such work as a hobby.

The CO issued the Final Determination on April 7, 1995 (AF 3), finding the Employer failed to document the Daily Breeze was the paper most likely to generate a response from U.S. workers, failed to establish the job was offered at the actual minimum requirements as the Alien had no more experience than U.S. applicants when he "performed this work as a hobby," failed to establish job related reasons for rejecting U.S. applicants Bailey and Gillespie, and failed to document timely contact of applicant Castillo in violation of 20 C.F.R. §§ 656.24(b)(1), 656.21(b)(6), 656.21(g) and 656.20(c)(8).

On May 11, 1995, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must advertise the job opportunity in a newspaper of general circulation or in a professional trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified and available U.S. workers. 20 C.F.R. § 656.21(g). An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has established lawful job-related reasons for rejecting U.S. applicants, and did not stop short of fully investigating an applicant's qualifications. The burden of obtaining proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is explicit. *H.C. LaMarche Ent, Inc.,* 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In this case, the CO contends that the Employer chose to advertise in a different publication that instructed by the EDD and failed to adequately document that its choice of publications was the most appropriate. The employer bears the burden of establishing in rebuttal that the CO was incorrect in finding the Employer advertised in an incorrect publication. *Peking Gourmet*, 88-INA-323 (May 11, 1989)(*en banc*). In rebuttal, the employer contended that someone at the Los Angeles Times had told him the Daily Breeze has a higher circulation on weekdays and offered a map of the circulation area. The Employer's undocumented assertion by a third party is insufficient to carry its burden of proof. *Carl Joecks, Inc.*, 90-INA-406 (Jan. 16, 1992). Moreover, the map showing the circulation area establishes nothing without a

corresponding map of he L.A. Times circulation area. Consequently, we agree with the CO that the Employer has failed to carry its burden that it advertised in the publication "most likely to bring responses from able, willing, qualified and available U.S. workers in violation of 20 C.F.R. § 656.21(g).

Moreover, the Employer has failed to establish that the Alien possessed the minimum requirements for the position, as it indicated he had only worked making wood components of vintage automobiles "as a hobby". See *Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*). Accordingly, we also find the Employer has failed to offer the position at its actual minimum requirements. *Showboat Restaurant*, 89-INA-27 (Jan. 31, 1989). This violation is compounded by the fact that the Employer rejected U.S. workers Bailey and Gillespie for failing to possess adequate experience. See *Mah Industries*, 92-INA-187 (Apr. 28, 1993).

Finally, we also find the employer failed to timely contact U.S. applicant Castillo. The Employer contends that it made repeated phone calls with no response, and then sent a certified letter some seven weeks after receiving his resume. Even considering the Employers excuse of unanswered phone messages, the seven week time period is patently unreasonable. See *Loma Linda Foods*, 89 -INA-289 (Nov. 26, 1991)(*en banc*)(seven week delay unreasonable); *I and E Electric*, 90-INA-252 (July 22, 1991)(more than 30 days to make contact unreasonable); *Larry Christie, Contractor*, 90-INA-135 (Apr. 29, 1991)(40 days to make contact unreasonable).

Based on the foregoing, we find that the Employer has violated 20 C.F.R. § 656.24(b)(1), 656.21(b)(6), 656.21(g) and 656.20(c)(8). The CO's denial of labor certification on this issue was therefore, proper.

Order

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.